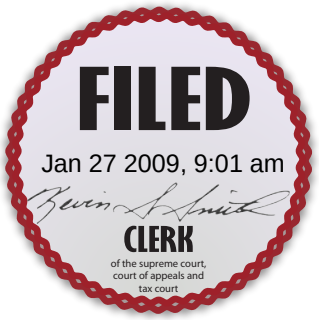

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IN THE
COURT OF APPEALS OF INDIANA

DANIEL WASDEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 60A05-0806-CR-339
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE OWEN CIRCUIT COURT
The Honorable Frank M. Nardi, Judge
Cause No. 60C01-0704-FC-139

January 27, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Daniel Wasden appeals his convictions for six counts of Auto Theft,[1] a class D felony. Specifically, Wasden raises the following arguments: (1) the trial court erroneously denied his motion for discharge after his right to a speedy trial was allegedly violated; (2) the trial court erroneously denied Wasden's motion to sever two of the auto theft counts from the remaining counts; and (3) there is insufficient evidence supporting one of Wasden's convictions. Finding that the trial court properly denied Wasden's motion for discharge but erroneously denied his motion to sever, we affirm in part, reverse in part, and remand with instructions to retry Counts I and II separately.

FACTS

On March 26, 2007, Wasden, William Lewis, Ben West, Cody Winters, and Jeff Nanny traveled from Owen County to Louisville, Kentucky. As they drove through Salem, they noticed a dirt bike in a motorcycle shop, and on the way back from Louisville, they stopped at the shop. West broke the shop's window and removed the dirt bike, which the group took to Mike Jorgenson's house, where Wasden stayed from time to time. During the next few weeks, Wasden and Lewis occasionally took the dirt bike to West's house and rode it on dirt trails.

On March 28, 2007, Wasden and Lewis stole another dirt bike. Wasden's girlfriend drove him around while Lewis waited for the dirt bike's owner to leave the house. At one point, Wasden saw the owner at a gas station and called Lewis, telling him to "get [the dirt bike] because [he] had a window" while the owner was at the gas station.

[1] Ind. Code § 35-43-4-2.5(b)(1).

Tr. p. 353-54. Lewis grabbed the dirt bike, pushed it into an alley, and called Wasden to pick him up. Lewis believed that someone had seen him take the dirt bike, so Wasden picked him up but they left the dirt bike behind.

On April 7, 2007, Wasden drove West, Lewis, and Shawn Price to a residence to steal the owner's four-wheeler. Wasden dropped off Lewis and West and parked his truck down the street from the house. Lewis and West broke into the garage and took the four-wheeler. The men then pushed and loaded the vehicle onto Wasden's truck and took it to Jorgenson's house.

On April 8, 2007, Wasden drove Lewis and West to another residence to steal another dirt bike. Wasden parked his truck while Lewis and West took the bike, after which they loaded the dirt bike onto Wasden's truck and later dropped it off at a vacant warehouse. Later that morning, Wasden drove Lewis and West to a site where they planned to steal another four-wheeler. As before, Lewis and West took the four-wheeler and the men loaded it onto Wasden's truck, later hiding it near a river.

A few hours later, Wasden, Lewis, and West were given a ride to another residence where they planned to take another four-wheeler. The men found the four-wheeler in the bed of the owner's truck, lifted it out of the truck, rolled it into an alley, and called Nanny to come and pick them up. Nanny arrived driving Wasden's truck. They loaded the four-wheeler onto the truck and then retrieved the other four-wheeler from the river and the dirt bike from the warehouse. The next day, they used the dirt bikes and the four-wheelers on trails at West's house. Two days later, the police arrived

at West's house with a search warrant. The police recovered the stolen dirt bikes and four-wheelers.

On April 12, 2007, the State charged Wasden with six counts of class D felony auto theft and one count of class C felony burglary. At the initial hearing on July 30, 2007, Wasden advised the trial court that he would find his own attorney and the trial court scheduled the jury trial for January 9, 2008. On August 3, 2007, Wasden sent the trial court a letter requesting appointed counsel and indicating that he wanted a "quick and speedy trial." Appellant's App. p. 20. On August 7, 2007, the trial court appointed Terry English to represent Wasden. On September 13, 2007, English appeared at a pretrial conference where the trial court reaffirmed the trial date of January 9, 2008. The following day, Wasden wrote the trial court a letter requesting that English be removed as attorney because he had allegedly never contacted Wasden, stating that he was attempting to find his own representation, and restating his request for a speedy trial. On September 25, 2007, the trial court permitted English to withdraw as counsel because Wasden had hired Paul Watts as his new attorney.

On November 7, 2007, Watts filed a motion for discharge pursuant to Indiana Criminal Rule 4(B)(1), arguing that Wasden had been denied his requested speedy trial. The State argued in response that Wasden had caused the delay by repeatedly changing his mind about his representation. The trial court denied the motion, finding that Wasden had caused the delay by requesting appointed counsel and that he had never objected to the January trial date. On December 4, 2007, Wasden requested that Watts be removed

as his attorney, and on December 11, 2007, the trial court granted the request and appointed Angie Grogan as counsel. On January 4, 2008, Grogan filed a motion to continue the trial, which the trial court granted, rescheduling the trial for March 19, 2008.

On March 11, 2008, Wasden filed a motion to sever the counts for trial, arguing that he would be prejudiced by the combination of charges and that jury confusion would result.[2] The trial court denied the motion.

Wasden's jury trial took place on March 19, 20, and 24, 2008. The jury found Wasden guilty of all six charges of auto theft and did not reach a verdict on the class C felony burglary charge. At a May 13, 2008, sentencing hearing, the trial court imposed an aggregate sentence of eight and one-half years, with four of those years suspended to probation. Wasden now appeals.

DISCUSSION AND DECISION

I. Speedy Trial

Wasden first argues that the trial court erroneously denied his motion to discharge pursuant to Indiana Criminal Rule 4(B). The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, section 12 of the Indiana Constitution. Leek v. State, 878 N.E.2d 276, 277 (Ind. Ct. App. 2007). The provisions of Criminal Rule 4 help to implement this right by establishing

[2] Although the motion to sever was filed only eight days before the trial was scheduled to commence, the timeliness of the motion was not an issue, inasmuch as the relevant statute requires only that motions for severance be filed before trial: "A defendant's motion for severance of crimes or motion for a separate trial must be made before commencement of trial . . . ." I.C. § 35-34-1-12(a). In fact, the statute goes on to provide that a motion for severance "may be made before or at the close of all the evidence during trial if based upon a ground not previously known." Id.

time deadlines by which trials must begin. Collins v. State, 730 N.E.2d 181, 182 (Ind. Ct. App. 2000). The purpose of this rule is to assure criminal defendants of early trials, not to provide them with a technical means of avoiding trial. State v. Jackson, 857 N.E.2d 378, 380 (Ind. Ct. App. 2006). We review challenges based on Criminal Rule 4 de novo. Jenkins v. State, 809 N.E.2d 361, 367 (Ind. Ct. App. 2004).

Indiana Criminal Rule 4(B) provides as follows:

> If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar. . . .

A defendant must maintain a position reasonably consistent with his request for a speedy trial, and he must object at the earliest opportunity to a trial setting that is beyond the seventy-day time period. Hill v. State, 777 N.E.2d 795, 798 (Ind. Ct. App. 2002). If an objection is not timely made, the defendant is deemed to have acquiesced to the later trial date. Townsend v. State, 673 N.E.2d 503, 506 (Ind. Ct. App. 1996).

Wasden appeared at the initial hearing on July 30, 2007, at which time the trial court set Wasden's trial for January 9, 2008. Wasden did not object. He first requested a speedy trial on August 3, 2007, meaning that the seventy-day deadline was reached on or about October 13, 2007. When Wasden made his initial speedy trial request, he failed to object to the January 9, 2008, trial date. Wasden later again explicitly requested a speedy trial at least once but again failed to object to the January 9, 2008, trial date. On

September 13, 2007, Wasden's attorney was present for a pretrial conference, at which time the trial court reaffirmed that the trial was set for January 9, 2008. No objection was made. On September 25, 2007, a new attorney began representing Wasden. Over a month passed with no objections lodged to the January 9, 2008, trial date.[3] On November 7, 2007, Wasden's attorney filed a motion for discharge. Given these facts, we can only conclude that Wasden repeatedly acquiesced to the January 9, 2008, trial date by failing to object in a timely fashion. Therefore, the trial court did not err by denying Wasden's motion for discharge.

II. Motion to Sever

Wasden next argues that the trial court abused its discretion by failing to sever the first two counts from the remaining counts. Two or more offenses may be joined in the same indictment or information when the offenses are (1) of the same or similar character, even if not part of a single scheme or plan, or (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. Ind. Code § 35-34-1-9. If two or more offenses are joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant has a right to a severance of the offenses. I.C. § 35-34-1-11. In all other cases, the trial court shall grant a severance if it determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense. Id. The factors to be considered in making that determination include: (1) the

[3] Even if Wasden was not present at the September 13, 2007, hearing, he still should have objected to the trial date in a timely fashion after his new counsel was appointed on September 25, 2007. He did not do so.

number of offenses charged; (2) the complexity of the evidence to be offered; and (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. Id.

Here, Wasden argues that he was entitled to have Counts I and II severed from the remaining counts. Count I alleged that Wasden committed auto theft when, on April 10, 2007, he knowingly exerted unauthorized control over the dirt bike that was stolen from the Salem motorcycle shop on March 26, 2007. Appellant's App. p. 11. Count II alleged that Wasden committed auto theft on March 28, 2007, when he drove around and informed Lewis when the targeted dirt bike's owner was at a gas station, leading to Lewis stealing the dirt bike and ultimately leaving it in an alley. The remaining offenses relate to the April 7 and 8, 2007, thefts of two four-wheelers and two other dirt bikes. Wasden argues that Counts I and II were joined with the remaining offenses solely because they were of the same or similar character, meaning that he is entitled to severance as a matter of right.

The State disagrees, arguing that the offenses were joined because they were based on a single scheme or plan. Crimes are considered part of a single scheme or plan for the purpose of Indiana Code section 35-34-1-9 when there is evidence linking the crimes by a common modus operandi. Ben-Yisrayl v. State, 690 N.E.2d 1141, 1145 (Ind. 1997). "Modus operandi" refers to "a pattern of criminal behavior so distinctive that separate crimes may be recognized as the work of the same wrongdoer." Goodman v. State, 708 N.E.2d 901, 903 (Ind. Ct. App. 1999). The methodology of the crimes must be both

strikingly similar and unique in such a way as to attribute the crime to a single person. Id.

In Pardo v. State, 585 N.E.2d 692 (Ind. Ct. App. 1992), a panel of this court considered a defendant who had been charged with four counts of theft arising from a September 1989 incident and a charge of attempted theft arising from a November 1989 incident. In September, Pardo, his brother, and an unidentified individual used Pardo's father's truck to steal car stereos from vehicles parked in the lot of an apartment complex. Police discovered that several cars in the lot had been entered and had their stereos stolen, and when they found Pardo's father's truck in the same parking lot, they found several car stereos, a set of golf clubs, and car keys belonging to someone else. In November, Pardo broke into a car by smashing the window and proceeded to tear apart the dashboard, evidently in an attempt to steal property from the vehicle. Pardo moved to have the September theft charges severed from the November charge, and the trial court denied the motion.

On appeal, the State argued that the offenses were joined because they were based on a single scheme or plan "'to break into cars and steal property out of them.'" Id. at 694 (quoting the State's appellate brief). This court disagreed, concluding that, although it was "obvious" that the September charges were of the same or similar character as the November charge, the State had presented no evidence establishing that the thefts were connected or were part of a single scheme or plan. Id. at 695. Specifically, the crimes in question were connected neither by a distinctive nature nor by a common modus operandi

because the September thefts were performed by Pardo and others but Pardo had acted alone in the November attempted theft. Furthermore, the September thefts involved entry into the vehicles via unlocked doors, whereas in the November attempted theft, entry was gained by smashing a window. Therefore, this court reversed the trial court, holding that the charges had been joined merely because the offenses were of the same or similar character; therefore, Pardo had the right to have the September offenses severed from the November offense for trial.

Here, Wasden concedes that Counts III, V, VI, and VII were appropriately tried together because these counts, based on the April 6 and April 8 thefts,

> all involved Wasden, Lewis and West stealing either dirt bikes or four wheelers together from various places in Owen County. Moreover, all of those crimes occurred within days and/or a span of hours of each other. In short, the methodology of those four crimes was arguably strikingly similar and unique such that they could have been attributed to Wasden, West, and Lewis.

Reply Br. p. 6. In other words, those crimes shared a common modus operandi and/or a distinctive nature such that the State established that the offenses were joined because they were based on a single scheme or plan. Thus, Wasden was not entitled to severance as a matter of right and does not argue that the trial court abused its discretion by denying his motion with regard to these counts.

Counts I and II, however, are a different story. Count I stemmed from the theft of a dirt bike from a motorcycle shop in Salem by West. Wasden, Lewis, and others were riding in the truck. The charge is based on the fact that Wasden allegedly rode that bike

on West's property in April. Count II involved Lewis stealing a dirt bike as Wasden drove around and informed Lewis that the bike's owner was at the gas station. That dirt bike did not end up at West's house; instead, Lewis stole the bike and left it against a fence in an alley near the owner's residence.

As in Pardo, it is evident that Counts I and II are of the same or similar character as the remaining counts. But also as in Pardo, the State has failed to establish a distinctive nature or common modus operandi linking these counts with the others—there is no unique methodology such that the crimes could be attributed to West, Lewis, and Wasden. In other words, there is no evidence that a single scheme or plan was behind all of these offenses. Count I concerned a theft from a store in a different county and involved people aside from West, Lewis, and Wasden. Count II concerned a theft committed by Lewis and involved a dirt bike that did not even end up being relocated to West's property. Under these circumstances, we find that Wasden was entitled to severance of these offenses from the remaining offenses and from each other as a matter of right. Thus, the trial court erroneously denied his motion to sever these charges and we remand for retrial.[4]

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to retry Counts I and II separately.

NAJAM, J., and KIRSCH, J., concur.

[4] Inasmuch as we remand Count I for retrial, we need not address Wasden's argument that there was insufficient evidence supporting this conviction.